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No. 82-1095

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

ROBERT ALTON HARRIS,

Cross-Petitioner,

v.

R. PULLEY, Warden of the California State Prison at San Quentin,

Cross-Respondent.

OPPOSITION TO THE CROSS PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOHN K. VAN DE KAMP, Attorney General
of the State of California
DANIEL J. KREMER, Chief Assistant
Attorney General--Criminal Division
STEVEN V. ADLER,
Deputy Attorney General
MICHAEL D. WELLINGTON,
Deputy Attorney General

110 West A Street, Suite 700
San Diego, California 92101
Telephone: (619) 237-7666

Attorneys for Cross-Respondent

QUESTION PRESENTED

Whether the 1977 California death penalty legislation, under which petitioner was sentenced, violates the Eighth and Fourteenth Amendment prohibition against cruel and unusual punishment?

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v.	)
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Cross-Respondent.	)

OPPOSITION TO THE CROSS PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

INTRODUCTION

Cross-respondent, R. Pulley, Warden of the California State Prison at San Quentin, respectfully requests that this Honorable Court deny the cross petition for writ of certiorari in which petitioner seeks review of that portion of the judgment of the United States Court of Appeals for the Ninth Circuit (entered on September 16, 1982) which ruled California's 1977 death penalty law to be valid on its face.

* * * * * *

OPINIONS BELOW

On February 11, 1981, the California Supreme Court affirmed the conviction and judgment of death in People v. Harris, 28 Cal.3d 935, 171 Cal.Rptr. 679, 623 P.2d 240.

After two unsuccessful petitions for writ of certiorari to this Court, three unsuccessful petitions for writs of habeas corpus in the California courts and one unsuccessful petition for writ of habeas corpus in the United States District Court for the Southern District of California, cross-petitioner's appeal was heard by the United States Court of Appeals for the Ninth Circuit which issued its opinion on September 16, 1982. (Harris v. Pulley 692 F.2d 1189 (9th Cir. 1982).) The Ninth Circuit found California's 1977 death penalty statute facially valid, but concluded that the California Supreme Court was obligated to provide a specific form of "proportionality review."

JURISDICTION

Cross-petitioner invokes the jurisdiction of this Court under 28 U.S.C. section 1254 (1) and rules 19.5 and 20.5 of the rules of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Cross-petitioner relies on the Eighth and Fourteenth Amendments to the United States Constitution, set out at page two of his cross-petition. In addition, cross-respondent relies on a series of California Constitutional and statutory provisions set out at pages two through sixteen of appendix A to this opposition to the cross-petition.

STATEMENT OF THE CASE

In an information filed by the District Attorney of San Diego County, California, Robert Alton Harris was charged with the kidnap, robbery, and murder of John Mayeski and Michael Baker. Harris was further charged with receiving stolen property, and being a convicted felon in

possession of a concealable firearm. It was additionally alleged that Harris had served a prior prison term for voluntary manslaughter, and that he was armed with and did personally use a firearm during the kidnap, robbery and murder of the two boys. Finally, with respect to each of the two counts of murder special circumstances were alleged which qualified Harris for the death penalty. As to each murder it was alleged that the murder was committed during the commission of a robbery. It was also alleged that each murder was committed during the commission of a kidnap for the purposes of robbery. It was also alleged as to each murder that Harris was guilty of more than one murder.

Harris' trial began November 30, 1978, and on January 23 and 24, 1979, the jury found him guilty of all counts, found to be true the allegations of a prior prison term and arming and use of firearms, found the two murders to be in the first-degree, and found the special circumstances alleged with regard to the murders to be true.

A penalty phase began January 29, 1979, and on February 8, 1979, the jury declared the penalty for each count of murder to be death. A motion for new trial was denied and a judgment of death was signed on March 6, 1979.

An automatic appeal from the judgment of death was taken to the California Supreme Court which, on February 11, 1981, affirmed the conviction and the judgment of death.

Harris pursued state habeas corpus through all three levels of California state courts, with his petition being denied by the California Supreme Court on January 13, 1982.

On March 5, 1982, (eleven days prior to his scheduled execution) Harris filed a 133 page petition for habeas corpus in the United States District Court for the Southern District of California. Following a hearing held

March 12, 1982, the District Court found Harris' contentions to be legally without merit and dismissed the petition, granting a certificate of probable cause. On that same day the United States Court of Appeals for the Ninth Circuit, in a telephonic hearing, granted a stay of execution pending an expedited appeal to that court.

Briefs were filed on an expedited schedule in the Court of Appeals and, on May 11, 1982, oral argument was held in San Francisco. On September 16, 1982, the Court of Appeals issued its opinion vacating the District Court's dismissal of Harris' petition with instructions that the writ should be granted unless the California Supreme Court holds a "proportionality review" within 120 days of the filing of the opinion. Our petition for rehearing and suggestion for rehearing en banc were denied November 15, 1982, in an order which also modified the opinion. On November 29, 1982, a stay of the mandate was granted to December 30, 1982.

Our petition for writ of certiorari was docketed in this Court on December 29, 1982, as number 82-1095.

The facts surrounding Harris' crimes are completely recounted in the California Supreme Court opinion on direct appeal. (People v. Harris 28 Cal.3d 935, 943-948; 171 Cal.Rptr. 629, 683-685.) They are also summarized briefly at pages 9 through 11 of our present, pending, petition for writ of certiorari.

SUMMARY OF ARGUMENT

The cross-petition for writ of certiorari in this case should be denied. California's 1977 capital punishment statute fully and properly meets the requirements set out by the opinions of this Court. The constitutionality of that statute has been upheld by the California Supreme Court, the United States District Court for the Southern District of

California, and the United States Court of Appeals for the Ninth Circuit. Furthermore, this Court has twice previously denied Harris' petitions for writs of certiorari on precisely the same grounds presented here. The only legitimate issue in this case is the question of the requirement, and scope of proportionality review. The question of the California statute's facial validity has been repeatedly and properly decided and needs no further litigation.

ARGUMENT

THE CALIFORNIA DEATH PENALTY STATUTES UNDER WHICH CROSS-PETITIONER WAS SENTENCED ARE CONSTITUTIONAL

For the third time in as many years cross-petitioner Robert Alton Harris asks this Court to rule that California's 1977 death penalty statutes are facially unconstitutional.

After the California Supreme Court affirmed Harris' conviction and judgment of death, he sought certiorari from this Court raising, inter alia, exactly the same issues presented in the current cross-petition. (Harris v. California No. 80-6702.) On October 5, 1981, this Court denied that petition. In 1982, following the denial of Harris' for petition for writ of habeas corpus by the California Supreme Court, he once again petitioned this Court urging the facial unconstitutionality of the California statute. (Harris v. California No. 81-6512.) On June 7, 1982, this Court denied that petition, too. Now, after having failed to persuade the United States Court of Appeals for the Ninth Circuit that California's statute is facial unconstitutional, he once again asks this Court to examine the issue and overturn the California statute.

After nine separate attempts before every available court in the nation, including two prior attempts with this Court, Harris has been unable to convince any court the California statute is unconstitutional. Only one court has found any fault whatsoever with the process by which California

intends to execute Harris. The United States Court of Appeals for the Ninth Circuit has ruled that a specific form of "proportionality review" is required prior to Harris' execution. This is the first time any court has made such a ruling. In our petition for writ of certiorari we have asked this Court to examine that question. It is a significant question in which the Ninth Circuit has taken a position at odds with the decisions of both the California Supreme Court and of this Court. Certiorari is necessary as to that issue.

However, as to the issue raised in Harris' cross-petition, certiorari is unnecessary. The question of the California statute's constitutional validity has been litigated exhaustively. Without exception, the courts that have examined it have ruled the statute to be constitutional. (See People v. Harris (1980) 28 Cal.3d 935, 171 Cal.Rptr. 679; People v. Jackson (1980) 28 Cal.3d 264, 158 Cal.Rptr. 603; People v. Frierson (1979) 25 Cal.3d 142, 158 Cal.Rptr. 281; Harris v. Pulley (9th Cir. 1982) 692 F.2d 1189.) The reasons for ruling against Harris on the contentions he raises are set out fully and adequately in those cases, as well as in our previous arguments to this Court on those issues found at pages 18 through 30 of exhibit A to this opposition to the cross-petition.

We urge that in the interest of simplicity and judicial economy, this Court should conclude that the issues raised in the cross-petition have been fully, fairly, and finally decided. Thus, although we ask this Court to grant our petition on the issue of proportionality review, we urge this Court deny Harris' cross-petition on the facial validity of the California statute.

* * * * * *

CONCLUSION

For the foregoing reasons it is respectfully requested that the cross-petition for writ of certiorari be denied.

Respectfully submitted,

JOHN K. VAN DE KAMP, Attorney General
of the State of California

DANIEL J. KREMER, Chief Assistant
Attorney General--Criminal Division

STEVEN V. ADLER,
Deputy Attorney General

MICHAEL D. WELLINGTON,
Deputy Attorney General

Attorneys for Cross-Respondent

MDW:slc

AFFIDAVIT OF SERVICE BY MAIL

ATTORNEY:

George Deukmejian,
Attorney General
Michael D. Wellington,
Deputy Attorney General

110 West "A" Street, Ste 700
San Diego, California 92101

No._____

ROBERT ALTON HARRIS,
Cross-Petitioner,

v.

R. PULLEY,
Cross-Respondent,

I, the undersigned, say: I am a citizen of the United States, over 18 years of age, employed in the County of San Diego, in which county the within-mentioned mailing occurred, and not a party to the subject cause; my business address is 110 West A Street, San Diego, California 92101.

I served the within OPP. TO CROSS-PETITION FOR WRIT OF CERTIORARI: an original and 39 copies on the United States Supreme Court as follows: Alexander L. Stevas, Clerk, United States Supreme Court, Washington, D.C. 20543, of which a true and correct copy of the document filed in the cause is affixed, by placing three copies thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

Michael J. McCabe
108 Ivy Street
San Diego, CA 92101

American Civil Lib. Union
Quin Denvir
State Public Defender
1390 Market St., Ste 425
San Francisco, CA 94102

American Psychiatric Assoc.
H. Bartow Farr III
Onek, Klein & Farr
2550 M. Street, N.W.
Washington, D.C. 20037

Edwin L. Miller
District Attorney
San Diego County
Post Office Box X-1011
San Diego, CA 92112

County Clerk, San Diego County
Post Office Box 128
San Diego, CA 92112
TO BE DELIVERED TO
JUDGE ELI H. LEVENSON

California Supreme Court
350 McAllister St., Rm. 4050
San Francisco, CA 94102

U.S. District Court
Southern District
U.S. Courthouse
940 Front Street
San Diego, CA 92189
TO BE DELIVERED TO
JUDGE ENRIGHT

U.S. Court of Appeals
Ninth Circuit
7th and Mission Streets
P.O. Box 547
San Francisco, CA 94101

Each envelope was then sealed and with the postage prepaid deposited in the United States Mail by me at San Diego, California, on the 25th day of February, 1983.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, February 25, 1983.

Clifford E. Reed, Jr.
CLIFFORD E. REED, JR.

Subscribed and sworn to before me
this 25th day of February, 1983.

Vida M. Allen
Notary Public in and for said County and State

VIDA M. ALLEN
NOTARY PUBLIC—CALIFORNIA
COUNTY OF SAN DIEGO
My commission expires Aug. 20, 1984

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-6702

ROBERT ALTON HARRIS,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

GEORGE DEUKMEJIAN, Attorney General
of the State of California
ROBERT H. PHILIBOSIAN, Chief Assistant
Attorney General--Criminal Division
DANIEL J. KREMER,
Assistant Attorney General
STEVEN V. ADLER,
Deputy Attorney General
MICHAEL D. WELLINGTON,
Deputy Attorney General

110 West A Street, Suite 700
San Diego, California 92101
Telephone: (714) 237-7666

Attorneys for Respondent

QUESTIONS PRESENTED

1. Whether the 1977 California death penalty legislation, under which petitioner was sentenced, violates the Eighth and Fourteenth Amendment prohibition against cruel and unusual punishment?

2. Whether denial of petitioner's change of venue motion, based on pretrial publicity, violated federal constitutional standards?

3. Whether penalty phase psychiatric testimony diagnosing petitioner as a sociopath and generally describing the characteristics of such persons denied petitioner due process and an impartial jury?

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IN THE SUPREME COURT OF THE UNITED STATES

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No. 80-6702

ROBERT ALTON HARRIS,

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v.

STATE OF CALIFORNIA,

Respondent.

OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

INTRODUCTION

Respondent, State of California, respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari in which petitioner seeks review of the judgment of the Supreme Court of the State of California entered on February 11, 1981, affirming the judgment of conviction and sentence of death.

* * * * * *

OPINIONS BELOW

On February 11, 1981, the California Supreme Court affirmed the conviction and judgment of death in People v. Harris, 28 Cal.3d 935, 171 Cal.Rptr. 679, 623 P.2d 240. Said opinion is attached as Exhibit A to the Petition for Writ of Certiorari.

On March 20, 1981, the California Supreme Court denied petitioner's Petition for Rehearing which denial is attached as Exhibit B to the Petition for Writ of Certiorari.

JURISDICTION

Petitioner invokes jurisdiction of this Court under Title 28, U.S.C. § 1254 and Rule 17 of the Rules of the Supreme Court. (Petn., p. 2.) (Since petitioner is seeking Writ of Certiorari to a state court it would appear that the correct jurisdictional citation would be Title 28, U.S.C. § 1257(3).)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions relied upon by petitioner are set out at pages 2 through 6 of the Petition. Respondent relies upon;

Article VI, section 11 of the Constitution of California:

> "The Supreme Court has appellate jurisdiction when judgment of death has been pronounced. With that exception courts of appeal have appellate jurisdiction when superior courts have original jurisdiction and in other causes prescribed by statute.
>
> "Superior courts have appellate jurisdiction in causes prescribed by

statute that arise in municipal and justice courts in their counties.

"The Legislature may permit appellate courts to take evidence and make findings of fact when jury trial is waived or not a matter of right."

Former California Penal Code section 190:

"Every person guilty of murder in the first degree shall suffer death, confinement in state prison for life without possibility of parole, or confinement in state prison for life. The penalty to be applied shall be determined as provided in Sections 190.1, 190.2, 190.3, 190.4, and 190.5. Every person guilty of murder in the second degree is punishable by imprisonment in the state prison for five, six, or seven years."

Former California Penal Code section 190.1:

"A case in which the death penalty may be imposed pursuant to this chapter shall be tried in separate phases as follows:

"(a) The defendant's guilt shall first be determined. If the trier of fact finds the defendant guilty of first degree murder, it shall at the same time determine the truth of all special circumstances charged as enumerated in Section 190.2, except for a special circumstance charged pursuant to paragraph (5) of subdivision (c) of Section 190.2 where it is alleged

that the defendant had been convicted in a prior proceeding of the offense of murder of the first or second degree.

"(b) If the defendant is found guilty of first degree murder and one of the special circumstances is charged pursuant to paragraph (5) of subdivision (c) of Section 190.2 which charges that the defendant had been convicted in a prior proceeding of the offense of murder of the first or second degree, there shall thereupon be further proceedings on the question of the truth of such special circumstance.

"(c) If the defendant is found guilty of first degree murder and one or more special circumstances as enumerated in Section 190.2 has been charged and found to be true, his sanity on any plea of not guilty by reason of insanity under Section 1026 shall be determined as provided in Section 190.4. If he is found to be sane, there shall thereupon be further proceedings on the question of the penalty to be imposed. Such proceedings shall be conducted in accordance with the provisions of Sections 190.3 and 190.4."

Former California Penal Code section 190.2:

"The penalty for a defendant found guilty of murder in the first degree shall be death or confinement in the state prison for life

without possibilty of parole in any case in which one or more of the following special circumstances has been charged and specially found, in a proceeding under Section 190.4, to be true:

"(a) The murder was intentional and was carried out pursuant to agreement by the person who committed the murder to accept valuable consideration for the act of murder from any person other than the victim;

"(b) The defendant, with the intent to cause death, physically aided or committed such act or acts causing death, and the murder was willful, deliberate, and premeditated, and was perpetrated by means of a destructive device or explosive;

"(c) The defendant was personally present during the commission of the act or acts causing death, and with intent to cause death physically aided or committed such act or acts causing death and any of the following additional circumstances exists:

"(1) The victim is a peace officer as defined in Section 830.1, subdivision (a) or (b) of Section 830.2, subdivision (a) or (b) of Section 830.3, or subidvision (b) of Section 830.5, who, while engaged in the performance of his duty was intentionally killed, and the defendant knew or reasonably should have known that such victim was a peace officer engaged in the performance of his duties.

"(2) The murder was willful, deliberate and premeditated; the victim was a witness to a crime who was intentionally killed for the purpose of preventing his testimony in any criminal proceeding; and the killing was not committed during the commission or attempted commission of the crime to which he was a witness.

"(3) The murder was willful, deliberate, and premeditated and was committed during the commission or attempted commission of any of the following crimes:

"(i) Robbery, in violation of Section 211;

"(ii) Kidnapping in violation of Section 207 or 209. Brief movements of a victim which are merely incidental to the commission of another offense and which do not substanitally increase the victim's risk of harm over that necessarily inherent in the other offense do not constitute a violation of Section 209 within the meaning of this paragraph.

"(iii) Rape by force or violence in violation of subdivision (2) of Section 261; or by threat of great and immediate bodily harm in violation of subdivision (3) of Section 261;

"(iv) The performance of lewd or lascivious acts upon the person of a child under the age of 14 years in violation of Section 288;

"(v) Burglary in violation of subdivision (1) of Section 460 of an inhabited dwelling house with an intent to commit grand or petit larceny or rape.

"(4) The murder was willful, deliberate, and premeditated, and involved the infliction of torture. For purposes of this section, torture required proof of an intent to inflict extreme and prolonged pain.

"(5) The defendant has in this proceeding been convicted of more than one offense of murder of the first or second degree, or has been convicted in a prior proceeding of the offense of murder of the first or second degree. For the purpose of this paragraph an offense committed in another jurisdiction which if committed in California would be punishable as first or second degree murder shall be deemed to be murder in the first or second degree.

"(d) For the purposes of subdivision (c), the defendant shall be deemed to have physically aided in the act or acts causing death only if it is proved beyond a reasonable doubt that his conduct constitutes an assault or a battery upon the victim or if by word or conduct he orders, initiates, or coerces the actual killing of the victim."

Former California Penal Code section 190.3:

"If the defendant has been found guilty of murder in the first degree, and a special circumstance has been charged and found to be true, or if the defendant may be subject to the death penalty after having been found guilty of violating subdivision (a) of Section 1672 of the Military and Veterans Code, or Sections 37, 128,

219 or 4500 of this code, the trier of fact shall determine whether the penalty shall be death or life imprisonment without possibility of parole. In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence, including, but not limited to, the nature and circumstances of the present offense, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the expressed or implied threat to use force or violence, and the defendant's character, background, history, mental condition and physical condition.

"However, no evidence shall be admitted regarding other criminal activity by the defendant which did not involve the use or attempted use of force or violence or which did not involve the expressed or implied threat to use force or violence. As used in this section, criminal activity does not require a conviction.

"However, in no event shall evidence of prior criminal activity he admitted for an offense for which the defendant was prosecuted and was acquitted. The restriction on the use of this evidence is intended to apply only to proceedings conducted pursuant to this section and is not intended to affect statutory or decisional law allowing such evidence to be used in other proceedings.

"Except for evidence in proof of the offense

or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time, as determined by the court, prior to the trial. Evidence may be introduced without such notice in rebuttal to evidence introduced by the defendant in mitigation.

"In determining the penalty the trier of fact shall take into account any of the following factors if relevant:

"(a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.

"(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence.

"(c) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

"(d) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

"(e) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

"(f) Whether or not the defendant acted

under extreme duress or under the substantial domination of another person.

"(g) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or the effects of intoxication.

"(h) The age of the defendant at the time of the crime.

"(i) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

"(j) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

After having heard and received all of the evidence, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section, and shall determine whether the penalty shall be death or life imprisonment without the possibility of parole."

Former California Penal Code section 190.4:

"(a) Whenever special circumstances as enumerated in Section 190.2 are alleged and the trier of fact finds the defendant guilty of first degree murder, the trier of fact shall also make a special finding on the truth of each alleged special circumstance. The

determination of the truth of any or all of the special circumstances shall be made by the trier of fact on the evidence presented at the trial or at the hearing held pursuant to subdivision (b) of Section 190.1.

"In case of a reasonable doubt as to whether a special circumstance is true, the defendant is entitled to a finding that it is not true. The trier of fact shall make a special finding that each special circumstance charged is either true or not true. Wherever a special circumstance requires proof of the commission or attempted commission of a crime, such crime shall be charged and proved pursuant to the general law applying to the trial and conviction of the crime.

"If the defendant was convicted by the court sitting without a jury, the trier of fact shall be a jury unless a jury is waived by the defendant and by the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of guilty the trier of fact shall be a jury unless a jury is waived by the defendantand by the people.

"If the trier of fact finds that any one or more of the special circumstances enumerated in Section 190.2 is charged is true, there shall be a separate penalty hearing, and neither the finding that any of the remaining special circumstances charged is not true,

nor if the trier of fact is a jury, the inability of the jury to agree on the issue of the truth or untruth of any of the remaining special circumstances charged, shall prevent the holding of the separate penalty hearing.

"In any case in which the defendant has been found guilty by a jury, and the jury has been unable to reach a unanimous verdict that one or more of the special circumstances charged are true, and does not reach a unanimouc verdict that all the special circumstances charged nare not true, the court shall dismiss the jury and shall order a new jury impaneled to try the issues, but the issue of guilt shall not be tried by such jury, nor shall such jury retry the issue of the truth of any of the special circumstances which were found by a unanimous verdict of the previous jury to be untrue. If such new jury is unable to reach the unanimous verdict that one or more of the special circumstances it is trying are true, the court shall dismiss the jury and impose a punishment of confinement in state prison for life.

"(b) If defendant was convicted by the court sitting without a jury, the trier of fact at the penalty hearing shall be a jury unless a jury is waived by the derendant and the people, in which case the trier of fact shall be the court. If the defendant was convicted by a plea of

guilty, the trier of fact shall be a jury unless a jury is waived by the defendant and the people.

"If the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the court shall dismiss the jury and impose a punishment of confinement in state prison for life without possibility of parole.

"(c) If the trier of fact which convicted the defendant of a crime for which he may be subjected to the death peanlty was a jury, the same jury shall consider any plea of not guilty by reason of insanity pursuant to Section 1026, the truth of any special circumstances which may be alleged, and the penalty to be applied, unless for good cause shown the court discharges that jury in which case a new jury shall be drawn. The court shall state facts in support of the finding of good cause upon the record and cause them to be entered into the minutes.

"(d) In any case in which the defendant may be subjected to the death penalty, evidence presented at any prior phase of the trial, including any proceeding upon a plea of not guilty by reason of insanity pursuant to Section 1026, shall be considered at any subsequent phase of the trial, if the trier of fact of

the prior phase is the same trier of fact at the subsequent phase.

"(e) In every case in which the trier of fact has returned a verdict or finding imposing the death penalty, the defendant shall be deemed to have made an application for modification of such verdict or finding pursuant to subdivision (7) of Section 1181. In ruling on the application the judge shall review the evidence, consider, take into account, and be guided by the aggravating and mitigating circumstances referred to in Section 190.3, and shall make an independent determination as to whether the weight of the evidence supports the jury's findings and verdicts. He shall state on the record the reason for his findings.

"The judge shall set forth the reasons for his ruling on the application and direct that they be entered on the Clerk's minutes.

"The denial of the modification of a death penalty verdict pursuant to subdivision (7) of Section 1181 shall be reviewed on the defendant's automatic appeal pursuant to subdivision (b) of Section 1239. The granting of the application shall be reviewed on the people's appeal pursuant to paragraph (6) of subdivision (a) of Section 1238.

"The proceedings provided for in this subdivision are in addition to any other proceedings on a defendant's application for a new trial."

Former California Penal Code section 190.5:

"(a) Nothwithstanding any other provision of law, the death penalty shall not be imposed upon any person who is under the age of 18 years at the time of commission of the crime. The burden of proof as to the age of each person shall be upon the defendant.

"(b) Except when the trier of fact finds that a murder was committed pursuant to an agreement as defined in subdivision (a) of Section 190.2, or when a person is convicted of a violation of subdivision (a) of Section 1672 of the Military and Veterans Code, or Sections 37, 128, 4500, or subdivision (b) of Section 190.2 of this code, the death penalty shall not be imposed upon any person who was a principal in the commission of a capital offense unless he was personally present during commission of the act or acts causing death, and intentionally physically aided or committed such act or acts causing death.

"(c) For the purposes of subdivision (b), the defendant shall be deemed to have physically aided in the act or acts causing

death only if it is proved beyond a reasonable doubt that his conduct constitutes an assault or a battery upon the victim or if by word or conduct he orders, initiates, or coerces the actual killing of the victim."

California Penal Code section 1181, subdivision 7:

"When the verdict or finding is contrary to law or evidence, but in any case wherein authority is vested by statute in the trial court or jury to recommend or determine as a part of its verdict or finding the punishment to be imposed, the court may modify such verdict or finding by imposing the lesser punishment without granting or ordering a new trial, and this power shall extend to any court to which the case may be appealed . . . ."

California Penal Code section 1239:

"(a) Where an appeal lies on behalf of the defendant or the people, it may be taken by the defendant or his counsel, or by counsel for the people, in the manner provided in rules adopted by the Judicial Council.

"(b) When upon any plea a judgment of death is rendered, an appeal is automatically taken by the defendant without any action by him or his counsel."

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STATEMENT OF THE CASE

The petitioner, Robert Alton Harris, was convicted after a jury trial of the offenses of kidnapping, robbery and first degree murder of John Mayeski and Michael Baker in violation of the California Penal Code sections 187, 189, 190, 209, subdivision (b), and 211. In addition petitioner was also convicted of receiving stolen property in violation of California Penal Code section 496, subdivision (1), and of possession of a concealable firearm by an ex-felon in violation of California Penal Code section 12021. Prior to the impanelment of the jury in this case, petitioner admitted this latter offense and an additional allegation that he had served a prior prison term for manslaughter, a "violent felony" within the meaning of California Penal Code section 667.5, subdivision (c). As to each of the kidnapping, robbery and murder counts alleged to have been perpetrated against each of the victims the jury found petitioner was armed with a firearm in violation of Penal Code section 12022, personally used a firearm within the meaning of Penal Code sections 1203.06 and 12022.5, and personally inflicted great bodily injury upon his victim in violation of California Penal Code section 12022.7.

The jury at the guilt phase of trial also found that special circumstances existed as to each of the homicides of which petitioner was convicted in that petitioner was convicted in this proceeding of more than one first degree murder (Cal. Pen. Code, § 190.2, subd. (c)(5)), and each of the murders was willful, deliberate, premeditated and committed during the commission of kidnapping and robbery (Cal. Pen. Code, § 190.2, subd. (c)(3)(i-ii)).

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At the penalty phase of the trial, the jury fixed the penalty at death. The sentence of death was thereafter imposed upon petitioner by the trial judge. Judgment and sentence were automatically appealed to the California Supreme Court and the judgment and sentence were affirmed.

The facts of petitioner's crimes, as well as those presented on the question of penalty are well summarized at pages 2 through 10 of the opinion of the California Supreme Court (attached as appendix A to the petition).

SUMMARY OF ARGUMENT

The petition for writ of certiorari in this case should be denied. California's capital punishment legislation under which petitioner was sentenced complies with federal and constitutional standards as set forth in recent United States Supreme Court decisions. Further, petitioner's motion for a change of venue was properly denied under existing federal constitutional standards. Finally, psychiatric testimony offered on question of penalty narrowly and properly rebutted defense evidence and did not invade the province of the jury.

ARGUMENT

I

THE CALIFORNIA DEATH PENALTY STATUTES UNDER WHICH PETITIONER WAS SENTENCED ARE CONSTITUTIONAL

Petitioner argues that California's 1977 capital punishment legislation under which he stands condemned is in violation of federal constitutional standards as enunciated in recent opinions of this Court. We disagree. So also does the California Supreme Court which for the past decade has continually expressed its willingness to overrule California

death penalty statutes if constitutionally suspect. Three times the California Supreme Court has now upheld the constitutionality of the 1977 legislation petitioner attacks. (People v. Harris (1980) 28 Cal.3d 935, 171 Cal.Rptr. 679, 623 P.2d 240; People v. Jackson (1980) 28 Cal.3d 264, 158 Cal.Rptr. 603, 618 P.2d 149; People v. Frierson (1979) 25 Cal.3d 142, 158 Cal.Rptr. 281, 599 P.2d 587.) Furthermore, it should also be noted that this Court has previously denied certiorari in People v. Jackson, supra, when presented with substantially the same constitutional attack on precisely the same legislation.

Although the voters of California have changed California's capital punishment scheme in some respects in an initiative measure approved November 7, 1978, that measure is not applicable to this case and all references in this brief in opposition will be to the 1977 legislation under which petitioner Harris was tried and condemned.

A. Federal Constitutional Standards As Announced By This Court

On July 2, 1976, this Court rendered a series of decisions relative to the constitutionality of the death penalty. (Gregg v. Georgia (1976) 428 U.S. 153; Proffitt v. Florida (1976) 428 U.S. 242; Jurek v. Texas (1976) 428 U.S. 262; Woodson v. North Carolina (1976) 428 U.S. 280; Roberts v. Louisiana (1976) 428 U.S. 325.) These cases upheld the constitutionality of the death penalty under federal grounds, but a plurality limited the procedures under which the death penalty could be given. Under the plurality decisions of these cases a constitutional death penalty statute would require the existence of (1) narrowly defined aggravating factors or categories of murder for

which capital punishment is authorized and (2) the opportunity for the defendant to present evidence and argument on and to have the jury consider mitigating circumstances with respect to both the commission of the offense and his personal characteristics which militate against imposition of the death penalty. (Gregg v. Georgia, supra, 428 U.S. at p. 199; Proffitt v. Florida, supra, 428 U.S. at pp. 252-256; Jurek v. Texas, supra, 428 U.S. at pp. 271-272.)

Thus, under federal standards capital punishment legislation must, ". . . focus on the particularized circumstances of the crime and defendant." (Gregg v. Georgia, supra, at p. 199.) A fundamental respect for humanity which underlies the eighth amendment, "requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." (Woodson v. North Carolina, supra, 428 U.S. at p. 304.) The death penalty statutes under which petitioner was tried and condemned comply amply with these federal constitutional standards.

B. California's 1977 Death Penalty Legislation

California's 1977 death penalty statute, related statutes, and related constitutional provisions are set out in full at the beginning of this brief in opposition. As previously indicated this statutory scheme has three times been upheld by the California Supreme Court and, in Jackson v. California, No. 80-6155, this Court has denied certiorari in the face of an almost identical attack on the same legislation.

The death penalty legislation in question leading up to a judgment of death is relatively straightforward

and, as a result, an encapsulized summary of its provisions seems unnecessary.

In addition, California Penal Code section 1239 provides for an automatic appeal in all capital cases. Article VI, section 11, of the California Constitution gives the California Supreme Court jurisdiction over cases in which the death penalty has been imposed. Both of these provisions are also set out in full in the beginning of this brief. It is apparent from these provisions that the death penalty statutes under which petitioner was sentenced and condemned were carefully drawn and based on the relevant recent decisions of this Court and are in full compliance with those decisions.

C. Petitioner's Specific Complaints

Petitioner's attack in his petition focuses on four specific complaints. First he urges that California's statutory scheme does not provide adequate guidance to the jury in imposing the death penalty. He also complains about the absence of requirement of a written statement by the jury of the basis for selecting the death penalty, as well as the absence of a specific burden of proof as to the factors underlying the death sentence. Finally he urges that the California scheme does not provide an adequate proportionality review of California death penalty cases. Although he does not argue that each of these is independently sufficient to render the entire statutory scheme unconstitutional, petitioner urges that his quartet of complaints, taken as a whole, must result in an invalidation of the law under which he was condemned. We shall examine his complaints in order.

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1. Objective Standards

As noted previously in this brief, this Court's recent decisions have indicated that constitutional death penalty statutes must feature narrowly defined aggravating factors or categories of murder for which capital punishment is authorized. In response to this requirement California Penal Code section 190.3 provided that in determining the penalty the trier of fact shall take into account any of a list of ten specified factors, to the extent they are relevant.

Petitioner complains that this is inadequate because the list of factors is not divided into specifically enumerated aggravating factors and specifically enumerated mitigating factors. This complaint is just plain silly. The majority of the factors listed in section 190.3 are presented in an alternative form such as section 190.3, subdivision (b), "The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence." Obviously such activity is either present or is not present. One alternative is aggravating, the other one may be seen as mitigating. While it may not be clear to petitioner which is which, we suggest that most ordinary minds would readily conclude that the presence of such violent activity is aggravating while the absence of such violent activity could be mitigating. Looking beyond the fatuousness of petitioner's argument, it is clear that the decisions of this Court have not required separate listings of mitigating and aggravating circumstances. While this Court has approved state statutes which did in fact separate such factors, the actual language

of this Court's plurality opinion merely required, "The sentencing judge must focus on the individual circumstances of each homicide and each defendant." (Proffitt v. Florida, supra, 428 U.S. at p. 252.) Thus this Court's opinion has mandated a procedure which, "guides and focuses the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose the sentence of death." (Jurek v. Texas, supra, 428 U.S. at p.274.) California's Penal Code section 190.3 clearly does this.

Petitioner further complains that the language in Penal Code section 190.3, which precedes the listing of factors, completely undermines the guidance apparently provided by giving the jury, "virtually limitless authorization to consider factors beyond those expressly enumerated." Petitioner's position reflects a misunderstanding of the statutory scheme.

Although we are unable to find language in that section exactly matching that quoted in the petition, petitioner apparently refers to the second sentence of the first paragraph of section 190.3 which provides,

> "In the proceedings on the question of penalty, evidence may be presented by both the people and the defendant as to any matter relevant to aggravation, mitigation, and sentence, including, but not limited to, the nature and circumstances of the present offense, the presence or absence of other criminal activity by the defendant which involved the use or attempted use of force or violence or which involved the expressed or implied threat to use force or violence, and the

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defendant's character, background, history, mental condition and physical condition."

It is apparent that this language is not an invitation to the sentencing authority to consider the factors beyond those expressly enumerated later in section 190.3. Rather, this language addresses the question of what evidence will be admissible at the penalty phase which can form the basis for the jury's consideration of the enumerated factors. These provisions are obviously directly responsive to this Court's admonition that the sentencing authority, "must focus on the individual circumstance at each homicide and each defendant." (Proffitt v. Florida, supra, 428 U.S. at p. 252.) This language is also responsive to the court's preference against, "unnecessary restrictions on the evidence that can be offered at such a hearing . . . ." (Gregg v. Georgia, supra, 428 U.S. at p. 203.) In Gregg the plurality opinion specifically stated, "So long as the evidence introduced and the arguments made at the presentence hearing do not prejudice defendant, it is preferable not to impose restrictions. We think it is desireable for the jury to have as much information before it as possible when it makes the sentencing decision." (Gregg v. Georgia, supra, at pp. 203-204.)

Thus it is apparent that section 190.3 provides precisely the objective standards required by this Court. The matters complained of by petitioner are either fully consistent with, or directly responsive to this Court's requirements.

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2. Written Statement of the Sentencing Authority

Petitioner next focuses on the fact that California's statutes do not require that the jury furnish a written statement of the basis upon which the death penalty was imposed, arguing that although this may not be sufficient in and of itself to invalidate the statutory scheme, it may be critical when considered in conjunction with other alleged deficiencies.

Initially, we note that we are unable to find any requirement in any of this Court's decisions that the sentencing authority provide such a written statement. Rather, in Gregg, Proffitt, and Jurek, this Court simply approved the statutory schemes which, in one form or another, made provisions of that nature. However, notwithstanding the fact that the jury itself is not required to provide such a written statement, California's statutory scheme does provide direct analogies to such a device.

California Penal Code section 190.4, subdivision (a), requires that a jury must make a specific finding relative to the truth or falsity of the special circumstance or circumstances which must be found true before a penalty phase may be held. Furthermore, in every case in which the jury imposes the death penalty, the defendant is deemed to have made an application for modification of the verdict under section 190.4, subdivision (e), and section 1181, subdivision (7), of the California Penal Code. In ruling on this application, the judge must state on the record the reason for his findings, and furthermore, should set forth the reasons for his ruling on the application and direct they be entered on the clerk's minutes.

Thus, although a written statement of the sentencing authority is not constitutionally required, California law did, at the time of petitioner's trial, require specific findings by the jury as to the special circumstances which authorize consideration of the death penalty and required that the judge state on the record the reasons for denying the mandatory application for modification of the death verdict. This is constitutionally sufficient.

3. Specific Burden of Proof

Petitioner next urges that the death penalty legislation under which he was condemned is unconstitutional because there is no requirement that the aggravating factors outweigh the mitigating factors, and further because there is no specific requirement that aggravating factors be found to exist beyond a reasonable doubt. Once again, this contention seems to be founded in a misconception of the total statutory scheme.

Before a death penalty sentence can be imposed, the trier of fact must first find the truth or falsity of the special circumstance or circumstances beyond a reasonable doubt. In the case of a reasonable doubt under section 190.4 of the Penal Code, the defendant is entitled to a finding that the special circumstance is not true. Therefore, the jury does have to find beyond a reasonable doubt that a special circumstance is true before the death penalty can even be considered. It is only after this true finding that a jury then begins to consider the aggravating and mitigating factors set forth in Penal Code section 190.3, at the penalty phase, thus, California's legislation is something like that which was upheld in Gregg v. Georgia, supra, 428 U.S. Under the Gregg legislation, there was

a narrowing of the class of murderers subject to capital punishment by specifying ten statutory aggravating circumstances, one of which had to be found by the jury to exist beyond a reasonable doubt before a death sentence could ever be imposed. Only after a finding of one of these circumstances by the jury could they then consider other listed mitigating or aggravating circumstances which might be supported by the evidence. (Gregg v. Georgia, supra, at pp. 196-197.)

In the same manner the 1977 California legislation limits the classes of murder by requiring that one or more special circumstances be found true beyond a reasonable doubt. Once this finding is made a penalty phase could be held during which the jurors would then consider the factors listed in Penal Code section 190.3. As was the case with the Georgia legislation no burden of proof is mentioned as to these additional aggravating and mitigating circumstances. Thus the California legislation in this respect mirrors that which was upheld in Gregg. (See also People v. Frierson, supra, 25 Cal.3d 142, 176, 158 Cal.Rptr. 81, 300-301, 599 P.2d 587, 606-607.)

Furthermore, this Court has not held that a burden of proof beyond a reasonable doubt must be imposed as to any circumstance for a death penalty statute to pass constitutional muster. In Proffitt v. Florida, supra, 428 U.S. 242, the jury was advisory to the trial court determining whether the mitigating circumstances outweighed the aggravating circumstances. However, no burden of proof was necessary in the Proffitt case. However, notwithstanding this, it should be remembered that California's 1977 legislation does in fact require proof beyond a reasonable doubt as to the special circumstances which allow the institution of

a death penalty phase. Thus, as in Gregg, once the sentencing body finds a special circumstance true beyond a reasonable doubt, then it may constitutionally consider other mitigating and aggravating factors. (See People v. Frierson, supra, 25 Cal.3d 142, 180, 158 Cal. Rptr. 281, 302-303, 599 P.2d 587, 608-609.)

4. Proportionality Review

Petitioner finally complains that the 1977 California legislation is unconstitutional for its failure to provide for proportionality review. To the contrary, we urge that the appellate guidelines for review in California are more than adequate.

As we have pointed out previously, all this Court's recent decisions require for a constitutionally sound death penalty statute is that the legislation have narrowly defined aggravating factors or categories of murder for which capital punishment is authorized and there would be an opportunity for the defendant to present evidence and argument and to have the jury consider the mitigating circumstances with respect to both the commission of the offense and his personal characteristics which militate against the death penalty.

This Court's decisions relied upon by petitioner did not require the kind of proportionality review he outlines. Rather, those decisions approved statutory schemes which, incidentally, contained review machinery quite similar to that provided in California. For example, in Jurek v. Texas, supra, 428 U.S. at p. 276, the appellate function is barely mentioned except for the fact that there is, "prompt judicial review of the jury's decision in a court with statewide jurisdiction." The fact that

appellate review in Texas is not delineated in any detail demonstrates that the constitutional requirement for this review is either minimal or nonexistent. Furthermore, in Proffitt v. Florida, supra, at pp. 251, 258-259, this Court noted that the Supreme Court of Florida, although there was no express requirement for proportionality review in any statutory form, had considered its function as including proportionality review.

In California, a criminal defendant in a death penalty case has an automatic appeal to the California Supreme Court. (Cal. Const. art. VI, § 11; Cal. Pen. Code, § 1239.) In much the same manner as the Florida Supreme Court, the California Supreme Court has unequivocally stated that it is prepared to afford whatever proportionality review that may be held constitutionally required. (See People v. Jackson, supra, 28 Cal.3d 264, 317, 318-319, 168 Cal.Rptr. 603, 631-632, 618 P.2d 149, 177-178; see also People v. Frierson, supra, 25 Cal.3d 142, 180-184, 158 Cal.Rptr. 281, 303-306, 599 P.2d 587, 610-612.) Certainly even a superficial examination of the California Supreme Court's decisions in death penalty cases over the last decade will eliminate any hypothetical concern that that court would allow imposition of the death penalty in a case where that penalty was so out of proportion to the crime involved that it even approached a violation of federal constitutional standards. Thus, the California statutory scheme provides for all the proportionality review contemplated by this Court's decisions.

After consideration of all these arguments it should be apparent that the capital punishment legislation under which petitioner was tried and condemned focuses

closely on the facts of petitioner's individual crime and additionally allows the sentencing body to consider mitigating circumstances with respect to both the commission of the offense and the personal characteristics of the defendant. Therefore, we submit that there was complete compliance with the standards set forth by the decision of this Court and that California's 1977 legislation is fully valid.

II

DENIAL OF PETITIONER'S MOTION FOR A CHANGE OF VENUE BASED ON PRE-TRIAL PUBLICITY DID NOT DENY HIM HIS FEDERAL CONSTITUTIONAL RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY

Before trial in this case petitioner moved for a change of venue based on pre-trial publicity. After a lengthy hearing the motion was denied as was petitioner's pre-trial writ to the California Supreme Court. Once again on his direct appeal from the Supreme Court petitioner was unsuccessful in his assertions that holding his trial in San Diego County, the location of the crime, necessarily denied him a fair trial before an impartial jury.

Petitioner once again contends that denial of his change of venue motion rendered his trial constitutionally infirm. In support of his position he urges that the California Supreme Court (1) improperly weighed the relevant factors and (2) gave excessive credence to the statements of the jurors on voir dire as to their awareness of the pre-trial publicity.

In rejecting the petitioner's argument, the California Supreme Court noted that the factors to be considered are (1) the nature and gravity of the offense, (2) the nature and extent of the news coverage, (3) the

size of the community, (4) the status of the defendant in the community, and (5) the popularity and prominence of the victims. It is agreed that petitioner's crimes were especially grisly and heinous. It is further agreed that the pre-trial news coverage was extensive. It is for this reason that the California Supreme Court concluded that these two factors militated towards a change of venue.

Two other factors, the status of the defendant in the community, and the popularity and prominence of the victims were termed "neutral" by the California Supreme Court. This is the focus of the first aspect of petitioner's attack. The facts, as found by the California Supreme Court are,

> "Although the murdered boys were popular among their friends and their families were respected in their neighborhood, there is no indication that the victims or their families were 'prominent.' [Citations omitted.] Defendant lived in the same community as his victims and worked in San Diego." (See Petn., Appen. A, p. 12.)

Petitioner urges that although the victims may have been virtually unknown prior to their murders they became known to the community at large following their deaths. This, of course, is true of any particularly disgusting homicide. Furthermore, petitioner argues that though he indeed lived and worked in San Diego, he was not well integrated into the community. Thus, petitioner concludes that because the murdered boys became known to the community after their murders, and because petitioner himself was not well integrated into the community, these two factors, "in fact weighed heavily in favor of a

change of venue." (Petn. at p. 9.) To call this stretching a point is an understatement.

Actually the California Supreme Court's characterization of these factors as neutral is very accurate. The murder victims were not unknown drifters passing through San Diego, nor were they prominent local personalities. They were just average American boys, growing up with their families in a quiet suburban neighborhood and thus fell somewhere in between the two ends of the spectrum. For this reason that factor was declared neutral. A similar analysis applies to the status of the defendant in the community. While he was hardly the local mayor or alderman, neither was he an outsider just passing through the community. He lived in the community where the victims were killed and he worked in San Diego. As such he too fell somewhere in the middle of the spectrum and this factor too was neutral.

Ignored by petitioner is the remaining factor which the California Supreme Court held to have "tipped the balance -- the size of the community of San Diego." As the California Supreme Court noted, San Diego County is the third most populous county in the state. (See Appen. A to Petn., p. 12.) At the pre-trial motion on this matter the trial court took judicial notice of the fact that San Diego's population was 1,677,800 and that the county is sprawled across 4261 square miles of land. (RT [9/7/78] 178.) It was further emphasized in the pre-trial hearings that San Diego County is quite diverse, with massive metropolitan areas, beach towns, large agricultural centers, and mountain hamlets. (CT 169.) As the California Supreme Court noted, the cases have specifically emphasized that the adversities

of pre-trial publicity are considered offset when a trial is conducted in a populous metropolitan area. (See Appen. A to Petn., p. 13.)

The fact that the large size of the community had dissipated the impact of any pre-trial publicity was made clear during voir doir of the prospective jurors. One of the advantages to a post-trial examination of such an issue is the ability to examine the voir dire of the jurors actually impaneled to determine the impact of the pre-trial publicity. This Court has noted that the voir dire may demonstrate that the publicity had no prejudicial effect. (Murphy v. Florida (1975) 421 U.S. 794, 800-802.) As the California Supreme Court noted,

> "Four of the jurors chosen had not been exposed to any pre-trial publicity. Of the remainder, none remembered anything in the least damaging to the defendant, none knew anything about his background, and none had formed an opinion concerning his guilt or innocence." (See Appen. A to Petn., 15.)

However, petitioner urges that we ought not give too much credence to the juror's sworn statements in this regard since few jurors (petitioner urges) would be likely to admit their inability to be fair when questioned in front of their fellows. (Petn., at p. 9.)

Whatever validity this concern may have in the ordinary case, it is completely defused by the voir dire procedures employed in this case. In a procedure that was unique in this case, but has since become the standard for California death penalty cases the prospective jurors were voir dired individually out of the presence of other

jurors. The express intention of this procedure was to provide the fullest possible encouragement to complete disclosure by the prospective jurors. The existence of this procedure evidences the awareness and concern on the part of the trial court for the very matters petitioner now urges. The trial judge's comments at the close of voir dire are particularly pertinent to this point.

> ". . . I was impressed with the forthrightness of the jurors. I think the fact that they were interviewed individually and questioned individually even increases the desire on the part of the juror to tell us precisely what their feelings were, not only with regard to the matters that were the subject of the examination, but the knowledge that they have required through the media or the listening to broadcasts and so on. I was impressed by the frankness of many of them who indicated even in one or two instances direct knowledge by reason of their having lived in the immediate vicinity and so on. I cannot say that the twelve jurors who had been chosen have no knowledge or have read nothing, because, of course, would indicate a jury of persons who did not have the type of mind that I think counsel would want to evaluate the testimony. I saw nothing, however, in the examination to indicate to me that the jury or in any sense there was a feeling of hostility, that there was antagonism, or that there was a knowledge so great as to

create an atmosphere that would not allow for a fair trial. As a matter of fact, I think the reverse is true. I am satisfied that the jury that has been selected was very fairly selected. I would compliment both counsel in the manner in which they conducted that examination, and I would say it was most extensive. And I, too, feel this record would stand up in any court in terms of obtaining a jury that would give a fair trial." (RT 2421-2422.)

Finally, petitioner urges that whatever the impact of the pre-trial publicity may have been on the guilt phase, it must have been particularly detrimental to the subtle and spiritual quality brought to the jury's determination as to penalty. Of course, all of the above comments relative to this issue in general apply here. However, a broader view of the evidence developed in this case seems particularly useful in assessing this last point.

By the time the jury retired to decide the issue of penalty they had a complete picture of petitioner. As outlined by the California Supreme Court's recounting of the facts, petitioner was pictured as a man who had killed three people, two of them innocent teenage boys. He had taken special relish in firing an unnecessary bullet into the head of one of the boys just to see what it would be like. He had eaten the dead boys' hamburgers and laughed at his brother's inability to do so. He had laughingly flicked bits of flesh from the muzzle of his gun recounting how he had blown the one boy's brains out, and then

lightheartedly relished the fantasy of dressing as a policeman and telling the boy's family of his death. He confessed six times prior to trial and then took the stand during trial to deny the crime and place the blame on his younger brother. Evidence of the penalty phase demonstrated that after his first killing he had followed the same pattern of initial confession followed by denial with a placement of the blame on another brother. The jury had heard that even after being placed in pre-trial confinement petitioner had continued to brag with relish about his murders, and had continued to prey on his fellows. He was twice caught making deadly weapons in jail. These few matters are but the highlights of the picture of appellant as the jury saw him. It has been and can still be reasonably asserted that if there was ever an argument for capital punishment it is Robert Alton Harris. The guilt and penalty phases of his trial were massively and appropriately prejudicial to him. Compared to that evidence any possible awareness the jurors might have had of his case before the trial pales into the most gossamer insignificance. Beyond any reasonable doubt petitioner was condemned to death because of his deeds and his character, not because some jurors may have been aware of the crime before the trial.

III

PSYCHIATRIC TESTIMONY RELEVANT TO PETITIONER'S REMORSE FOR THE CRIME DID NOT DENY HIM DUE PROCESS OF THE LAW

At the penalty phase of his trial petitioner found himself in something of an awkward position. He had confessed, sometimes in excruciating detail, six times prior to trial. Then he had taken the stand during trial,

denied guilt, and blamed his younger brother for the murders. The jury had obviously not believed him, and had obviously believed many other terribly unpleasant things about him. Furthermore, before petitioner got to the stand at the penalty phase that same jury had heard testimony that the last time petitioner killed someone he had also initially admitted it, then denied it and blamed it on a brother. From a strategic point of view it is clear that petitioner's maneuvering room had been largely circumscribed by the time it came for him to testify at the penalty phase. He had but one card left to play and he played it. He admitted guilt, making his seventh confession, this time on the witness stand, apologized, and claimed to be remorseful. He said he did not want to die. (RT 4386-4387.) Petitioner also put on evidence from a deputy sheriff who had been assigned to the jail while petitioner awaited trial. That deputy testified about an attempt by petitioner to slash his wrists in county jail and another attempt to stab himself in the stomach with a golf pencil. (RT 4580-4583.) That deputy testified that petitioner appeared remorseful.

To rebut this evidence of "remorse" the prosecution called Dr. Wait Griswold, a psychiatrist, who saw petitioner shortly after his arrest. After Mirandizing petitioner, Dr. Griswold had interviewed him and given him a battery of psychological tests. Based on this work-up Dr. Griswold diagnosed petitioner as an anti-social personality, also referred to as a sociopathic personality. Dr. Griswold testified that such persons seldom have any remorse for their crimes and are commonly manipulative in attempting to mitigate the consequences of their behavior. Such manipulativeness, the doctor testified, often includes

the staging of suicidal gestures in an attempt to call attention to themselves. (RT 4652-4655.)

Dr. Griswold made reference to the "suicide attempt" by petitioner in county jail noting that it is consistent with such gestures and with petitioner's personality disorder. The doctor noted that petitioner cut his arm in a place (mid forearm) where most laymen would know little serious damage would occur. Further, the doctor noted that the fact petitioner immediately sounded the tank alarm after cutting himself was particularly consistent with the attempt being a mere gesture. (RT 4653-4655.) Dr. Griswold's observations were further bolstered by testimony of the county jail deputies who had responded to the tank alarm and said that the pool of blood that they discovered, although large, appeared to have been diluted with water. (RT 4694-4695.)

Dr. Griswold did not testify that petitioner was not remorseful. He testified petitioner was a sociopath, that such persons are not usually remorseful, and that the circumstances underlying petitioner's ostensible remorse were entirely consistent with the manipulativeness most commonly found in such sociopaths.

Petitioner claims that the implied message in the doctor's testimony was that petitioner was lying about remorse and therefore deserves to die. (Petn. at p. 12.) Although petitioner cites no authority for the proposition, and offers scant reasoning, his apparent theory is that the jury was so overwhelmed by Dr. Griswold's unstated implication that it totally surrendered its decisional role to the doctor and adopted, without question, his

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allegedly implied conclusion. We would submit that this is all too tenuous and not sufficiently realistic.

As the California Supreme Court noted, "The prosecutor carefully avoided encroaching upon the jury's province when he examined Dr. Griswold on direct." (See Petn., Appen. A, at p. 38.) It must be remembered that it was petitioner who raised the issue of remorse. Thus the doctor's testimony was rebuttal which did no more than diagnose petitioner's personality disorder and demonstrate how his behavior is consistent with that, carefully stopping short of addressing the final factual question.

In his brief to the California Supreme Court petitioner argued that the doctor had, "set himself up as a human lie detector." To the extent this is the gravamen of petitioner's complaint the fact that Dr. Griswold never testified that petitioner was lying is one simple complete and direct answer. Furthermore, by the time Dr. Griswold testified there was no question left but that petitioner was an unredeemable liar. In fact, perhaps the most potent testimony on the issue of petitioner's credibility came from petitioner himself when he was asked about the lies he told during the guilt phase. On cross-examination by the prosecutor the following colloquy occurred.

"Q Now, it is clear you lied to the jury when you testified in the guilt phase.

"A Yes, I did.

"Q Was that decision yours?

"A Yes.

"Q Did anybody else know that you were going to lie?

"A No.

"Q And why did you lie to the jury then?

"A Well, there's two explanations; one is that I have nothing to lose, the other one is that it's easier to tell -- it's easier to tell a lie than to tell the truth. (RT 4448.)

In context, it seems absurd to argue that if the jury was suspicious of petitioner's credibility it was on the basis of some vague implication from Dr. Griswold rather than from petitioner's direct testimony and the weeks of evidence which had passed before.

Petitioner cites Smith v. Estelle 602 F.2d 694 (5th Cir. 1979), cert. granted, 445 U.S. 926. That case is currently before this Court and may raise the issue of the propriety of psychiatric testimony to establish future dangerousness as that issue must be determined prior to the imposition of the death penalty under Texas law. Obviously that issue is nothing like the one presented here. Dr. Griswold made no predictions whatsoever as to what petitioner's conduct would be like in the future, limiting his testimony rather to the nature of petitioner's personality disorder. In this regard it should be noted that the Court of Appeal in Smith v. Estelle, while exhibiting grave doubts as to the usefulness of psychiatric testimony to predict future conduct, seemed to conclude that psychiatric testimony might well be valid to catagorize individuals into specific groups which, as a whole, exhibit certain kinds of behavior. (Smith v. Estelle, supra, 602 F.2d at 700, fn. 7.) That, of course, is all that happened here. Certainly Dr. Griwold's testimony did not infringe upon petitioner's federal constitutional rights.

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CONCLUSION

For the foregoing reasons it is respectfully requested that the petition for writ of certiorari be denied.

Respectfully submitted,

GEORGE DEUKMEJIAN, Attorney General

ROBERT H. PHILIBOSIAN, Chief Assistant Attorney General--Criminal Division

DANIEL J. KREMER, Assistant Attorney General

STEVEN V. ADLER, Deputy Attorney General

MICHAEL D. WELLINGTON Deputy Attorney General

Attorneys for Respondent

MDW:cjf